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No. 95-407

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

ANGEL MARTEL,

Petitioner,

vs.

COUNTY OF LOS ANGELES, et al.,

Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Pursuant to Rule 15.6 of the Supreme Court Rules, the Petitioner, Angel Martel, respectfully submits this Reply to the Respondents' Brief in Opposition to his Petition for Writ of Certiorari.

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I.

Respondents materially misstate the question presented to the Court. The question here is not whether or not prejudice must be shown, but rather the scope of the proof necessary for the requisite showing of prejudice.

Respondents attempt to mislead the Court by incorrectly framing the issue posed by the Ninth Circuit's en banc decision. Petitioner has never urged the inapplicability of the harmless error rule. As Martel consistently argued below, and as found by both the Ninth Circuit panel and those judges who wisely dissented from the Court of Appeals en banc decision, Martel indeed was prejudiced by the district court's arbitrary restriction of discovery and concomitant refusal to continue trial of the cause.

Contrary to Respondents' assertions, the question actually presented to the Court is whether an appellant may show prejudice without demonstrating that the verdict against him would have been altered by the admission of substantive or impeachment evidence gained through discovery. The Ninth Circuit panel answered this question affirmatively, stating that "it is both unfair and pointless to

require a specific showing of the impact the district court's error had on the outcome of the proceeding." Panel op., 34 F.3d 731, 735, slip op. at 10363. The dissent to the en banc decision likewise advocated that the requisite demonstration of prejudice be made without showing "that the outcome of the case would have been different, had the continuance been granted." En banc op., 56 F.3d 993, 1000, slip op. at 6002.

Martel's position is that when a trial court denies appellant a continuance for further discovery, prejudicial error is shown if the total time permitted for discovery is so short that, given the entire course of the discovery proceedings (including the need to compel discovery from opponents), the complexity of the case and the exigencies of litigation practice, the appellant's attorney could not reasonably uncover material evidence or locate material witnesses. Such a showing should not be made without demonstrating that the appellant formulated a prudent plan for discovery and then diligently propounded a reasonably planned sequence of discovery demands. What should not be required, however, is the further showing demanded

under the Ninth Circuit's en banc opinion; specifically, a particularized demonstration that the outcome of the trial would have been different had time for discovery been extended.

Respondents further muddle the question presented to the Court by unnecessarily revisiting the issue of the district court's error in denying Martel's request for a continuance. Resp. Brief at 2-4, 7-10, 15-20. Apparently, Respondents are confused about the very scope and purpose of Supreme Court review. The Court does not ordinarily address an issue which the Court of Appeals has not addressed. *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 568, 101 S.Ct. 1923, 1930 (1981); *accord, Patrick v. Burget,* 486 U.S. 94, 99 n.5, 108 S.Ct. 1658, 1662 n. 5 (1988).

Martel seeks review of the Ninth Circuit's en banc construction and application of the harmless error provisions of 28 U.S.C. §2111 and Rule 61 of the Rules of Civil Procedure. The en banc opinion was expressly limited to the question of actual prejudice under the harmless error rule, and specifically did not address whether the trial court

abused its discretion in denying Petitioner a continuance. 56 F.3d at 995, slip op. at 5991. Accordingly, the propriety of the continuance would not be an issue which the Supreme Court would need to address. [1]

In an apparent effort to detract from the merits of Martel's petition, Respondents recite facts immaterial to the construction of the harmless error rule. For example, Respondents emphasize that Martel did not take the depositions of the eight Sheriff's deputies named as defendants in his lawsuit. Resp. Brief at 4, 9. Although this fact may bear upon the trial court's discretion in

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1 In any event, Respondents fail to cite authority in support of the district court's denial of the requested continuance. *Morris v. Slappy*, 461 U.S. 1, 103 S.Ct. 1610 (1983), cited by Respondents (Resp. Brief at 16-17), actually lends credence to Martel's position that the district court abused its discretion in denying a continuance. The Ninth Circuit panel found that the trial judge had, in effect, exhibited "an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay'". 461 U.S. at 8, 103 S.Ct. at 1616. This holding was undisturbed in the en banc opinion.

denying Martel a continuance for further discovery, it hardly is material to the application of the harmless error rule. [2]

II.

Respondents do not refute Petitioner's showing of a split among the circuits regarding the requirements for showing prejudice.

Respondents assert that "the circuits are united in requiring a showing of prejudice." Resp. Brief at 21. This is not surprising, since the question presented to the Court is not *whether* prejudice need be shown, but rather *how* it must be demonstrated.

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2 As the dissent aptly pointed out in the Ninth Circuit's en banc opinion, depositions are often prudently delayed until after responses to written discovery have been obtained. En banc op., 56 F.3d at 1005, slip op. at 6013. In Martel's case, responses to written discovery were not due until after the trial date, even though Martel had promptly served the defendants with interrogatories and inspection demands. Panel op., 34 F.3d at 733, slip op. at 10358.

None of the cases cited by Respondents require an appellant to show precisely what he or she would have gained from additional discovery and how it would have changed the ultimate result at trial. With one exception, all of the cases cited by Respondents are criminal cases involving the Sixth Amendment issue of effective assistance of counsel.

The harmless error rule was not even discussed in *United States v. Scott,* 48 F.3d 1389 (5th Cir. 1995). In *United States v. Davis*, 967 F.2d 516 (11th Cir. 1992), *United States v. Devin*, 918 F.2d 280 (1st Cir. 1990), and *United States v. Blandina,* 895 F.2d 293 (7th Cir. 1989), the defendants were able to obtain all discoverable evidence; the issue in each case was whether the respective defendant had adequate time to review the that evidence in preparation for trial. In *United States v. Sepulveda*, 15 F.3d 1161 (1st Cir. 1993), the defendants had failed even to request a continuance from the court. Accordingly, they lacked standing to assert a "delayed discovery" claim. *Id.*

In *Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82 (5th Cir. 1992), the only civil case cited by Respondents,

the issue was not the plaintiff's lack of opportunity to gather evidence, but rather the testimony of plaintiff's "surprise" witness, admitted over the city's objection. The appellate court held that the city had failed to explain how the witness's testimony had prejudiced its defense. This case obviously bears little resemblance to Martel's, where the appellant could not possibly know the affect of evidence never gathered.

Of the cases cited by Respondents, only *United States v. Koen*, 982 F.2d 1101 (7th Cir. 1992), touches on the issue presented to the Court by Martel's petition. Interestingly, the passage quoted by Respondents (Resp. Brief at 24) expressly acknowledges the unfairness of requiring an appellant to describe in detail testimony which was never presented. However, even if this rather ambiguous decision were construed to portend the Seventh Circuit's position on the question presented within, a split would still exist among the circuits regarding the requirement that an appellant demonstrate that additional discovery would effect the outcome at trial. As explained in Martel's petition, the Fourth, Fifth and Sixth circuits all

employ clear standards differing radically from that now set by the Ninth Circuit.

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